Supreme Court, U.S.
FILED
SEP 30 2004
OFFICE OF THE CLERK

(3)

No. 04-87

# In the Supreme Court of the United States

KOYO SEIKO CO., LTD. AND
KOYO CORPORATION OF U.S.A., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Acting Solicitor General*
*Counsel of Record*

GREGORY G. KATSAS
*Acting Assistant Attorney General*

DAVID M. COHEN
JEANNE E. DAVIDSON
CLAUDIA BURKE
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's longstanding, and admittedly reasonable, construction of a domestic antidumping statute, notwithstanding a recent World Trade Organization panel's allegedly inconsistent construction of purportedly analogous provisions in an international trade agreement, where Congress has specifically provided that World Trade Organization recommendations have no domestic legal effect except as implemented by the Executive Branch or Congress.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 11 |
| Conclusion | 22 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003) | 20 |
| *Bowe Passat Reinigungs-Und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138 (Ct. Int'l Trade 1996) | 9, 17 |
| *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) | 11 |
| *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359 (2004) | 13 |
| *George E. Warren Corp.* v. *U.S. Envtl. Prot. Agency*, 159 F.3d 616 (D.C. Cir. 1998), amended on other grounds, 164 F.3d 676 (D.C. Cir. 1999) | 21 |
| *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993) | 13 |
| *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) | 13 |
| *McCulloch* v. *Sociedad de Marineros de Honduras*, 372 U.S. 10 (1963) | 13, 18 |
| *McLaren* v. *Fleischer*, 256 U.S. 477 (1921) | 17 |
| *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) | 11-12 |
| *Serampore Indus. Pvt. Ltd.* v. *United States Dep't of Commerce*, 675 F. Supp. 1354 (Ct. Int'l Trade 1987) | 9, 17 |
| *Weinberger* v. *Rossi*, 456 U.S. 25 (1982) | 13 |
| *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978) | 17 |

Statutes: Page

Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11 (19 U.S.C. 160 *et seq.* (1976)) ..... 2
Tariff Act of 1930, ch. 497, Tit. VII, 46 Stat. 590 ..... 2
Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*) ..... 2
19 U.S.C. 1673 ..... 2, 9
19 U.S.C. 1673d(c)(1)(B) ..... 3
19 U.S.C. 1675 ..... 4
19 U.S.C. 1675(a)(2)(A) ..... 4
19 U.S.C. 1675(a)(2)(C) ..... 4
19 U.S.C. 1677(35)(A) ..... 3, 16
19 U.S.C. 1677(35)(B) ..... 3, 4, 16
19 U.S.C. 1677a(a) ..... 2
19 U.S.C. 1677a(b) ..... 3
19 U.S.C. 1677a(c) ..... 3
19 U.S.C. 1677a(d)(1)(A) ..... 3
19 U.S.C. 1677b ..... 11
19 U.S.C. 1677b(a) ..... 2, 15
19 U.S.C. 1677b(a)(1)(B)(i) ..... 2
19 U.S.C. 1677b(a)(1)(C) ..... 4
19 U.S.C. 1677b(a)(4) ..... 4
19 U.S.C. 1677b(a)(6) ..... 3
19 U.S.C. 1677b(a)(7) ..... 3
19 U.S.C. 1677b(c)(3) ..... 4
19 U.S.C. 1677f-1(d)(1)(A) ..... 15
19 U.S.C. 1677f-1(d)(2) ..... 15
Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.*) ..... 4
19 U.S.C. 3511 ..... 4
19 U.S.C. 3511(a) ..... 6, 8
19 U.S.C. 3511(d)(7) ..... 8
19 U.S.C. 3512 ..... 18
19 U.S.C. 3512(a)(1) ..... 5, 18
19 U.S.C. 3512(a)(2) ..... 5, 18-19
19 U.S.C. 3512(b)(2) (§ 102(b)(2)) ..... 19
19 U.S.C. 3512(c) ..... 10

Statutes—Continued: Page

19 U.S.C. 3512(c)(1) ..... 5, 19
19 U.S.C. 3512(c)(1)(B) ..... 9
19 U.S.C. 3512(d) ..... 6
19 U.S.C. 3512(d)(7) ..... 5
19 U.S.C. 3533 ..... 21
19 U.S.C. 3533(f)(3) ..... 6, 19
19 U.S.C. 3533(g)(1) ..... 6, 19
19 U.S.C. 3538(b)(4) ..... 6, 19

Miscellaneous:

*European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ..... 8, 9, 10, 11, 14, 16
*Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan*, 52 Fed. Reg. 37,352 (1987) ..... 7
*Tapered Roller Bearings and Certain Components from Japan*, 41 Fed. Reg. 34,974 (1976) ..... 7
*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. (2000):
p. 66,711 ..... 7
p. 66,712 ..... 7
*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews*, 66 Fed. Reg. 15,078 (2001) ..... 8
H.R. Doc. No. 316, 103d Cong., 2d Sess. Pt. 1 (1994) ..... 6, 8, 19-20
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Apr. 15, 1994) ..... 8, 10, 14, 15, 16, 22

Miscellaneous—Continued: Page

*United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) ..... 15

*United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) ..... 15, 16

# In the Supreme Court of the United States

No. 04-87

KOYO SEIKO CO., LTD. AND
KOYO CORPORATION OF U.S.A., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 354 F.3d 1334. The opinion of the Court of International Trade (Pet. App. 19a-49a) is reported at 240 F. Supp. 2d 1228.

### JURISDICTION

The judgment of the court of appeals was entered on January 16, 2004. A petition for rehearing was denied on March 17, 2004. On June 10, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 15, 2004, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Anti-Dumping Act, 1921, and the Tariff Act of 1930 have long provided for the imposition of anti-dumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an anti-dumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

In assessing whether merchandise is being "dumped" in the United States, the Department of Commerce adjusts both the "normal value" and the "export price" to achieve a "fair comparison" between the two. 19 U.S.C. 1677b(a). For example, the statute calls for subtracting transportation costs to the United States, if those are included in the export price, and eliminating the effect of import duties applied by the exporting

[1] This language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et seq.* (1976). It was subsequently re-enacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (re-codified at 19 U.S.C. 1673 *et seq.*).

country on imported parts. 19 U.S.C. 1677a(c), 1677b(a)(6) and (7).[2]

If the Department of Commerce makes a final determination that merchandise is being sold in the United States at less than its fair value, the Department is required to determine an "estimated weighted average dumping margin" for each exporter and producer and an "all-others" rate for those not individually investigated. 19 U.S.C. 1673d(c)(1)(B). Exporters and producers must then post a cash deposit or security for each entry in an amount based on the appropriate dumping margin. *Ibid.*

The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Under the Department of Commerce's long-standing construction of the statute, a "dumping margin" exits only when the normal value at which the product is sold in the exporting country "exceeds the export price" to

---

[2] Where, as in this case, there is a third-party intermediary, such as a broker or an affiliate of the seller, the statute calls for the Department of Commerce to use a "constructed export price," which entails further adjustment, including the elimination of commissions. 19 U.S.C. 1677a(b) and (d)(1)(A). Because the distinction between "export price" and "constructed export price" is irrelevant to the issues presented here, we will, for the sake of convenience, refer simply to "export price."

the United States by a positive value.[3] In other words, if the export price is the same as or higher than the normal value, the Department of Commerce deems there to be no, or zero, "dumping margin" for such sales, and thus nothing to include when summing the "aggregate dumping margin" that constitutes the numerator in the "weighted average dumping margin" ratio. Pet. App. 3a. These sales at or above the normal value are, however, reflected in the denominator of the ratio, which is the "aggregate export prices" of the exporter's sales. 19 U.S.C. 1677(35)(B).[4]

Once an affirmative dumping determination has been made, the statute provides for an administrative review of the antidumping duty to be conducted on an annual basis, upon request. 19 U.S.C. 1675. The dumping margin that is determined during the course of this review then becomes the basis for estimated anti-dumping duties that are collected on new entries of merchandise. 19 U.S.C. 1675(a)(2)(A) and (C).

2. In 1994, the United States became a signatory to the Uruguay Round Agreements. Congress enacted the Uruguay Round Agreements Act (URAA), 19 U.S.C. 3501 *et seq.*, to implement those executive agreements. 19 U.S.C. 3511. In the URAA, Congress established an elaborate process for resolving trade disputes that might arise concerning the agreements and domestic trade laws.

---

[3] Under certain circumstances not relevant here, normal value may be calculated using third-country sales, constructed value, or factors of production. 19 U.S.C. 1677b(a)(1)(C), (a)(4) and (c)(3).

[4] The inclusion of sales at and above the normal value in the denominator has the effect of lowering the weighted average dumping margin, and hence the anti-dumping duty, compared to what it would be if the denominator were derived using only export prices in sales in which dumping occurred.

As a general matter, Congress emphasized the continuing primacy of domestic law. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and pre-existing law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that the legislation implementing the Uruguay Round Agreements neither creates privately enforceable rights nor provides a basis for challenging an executive action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Congress was also very specific about how the United States would respond to reports issued by World Trade Organization (WTO) panels or the Appellate Body under the WTO Dispute Settlement Understanding. The Statement of Administrative

Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), states that WTO panels and the Appellate Body "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, 103d Cong., 2d Sess. Pt. 1, at 656, 659 (1994). To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

The URAA provides that, if a WTO panel concludes "that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" Congress, the United States Trade Representative (USTR), and the agency have consulted in the manner specified in the statute. 19 U.S.C. 3533(g)(1). During that process, the USTR, which represents the United States before the WTO, is to seek advice from the private sector, and the relevant agency must issue notice in the Federal Register and provide an opportunity for public comment. 19 U.S.C. 3533(g)(1).

The URAA specifically recognizes that the United States may choose *not* to alter the law or practice that is the subject of an adverse panel or Appellate Body report, and may instead offer the complaining party trade compensation of some other form. H.R. Doc. No. 316, *supra*, at 1016; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation" (emphasis added)); 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of new

determination consistent with WTO report "in whole or in part").

3. Petitioners are a Japanese company, Koyo Seiko Co., Ltd., and its wholly owned American subsidiary, Koyo Corporation of U.S.A., which manufacture tapered roller bearings, some of which are exported for sale in the United States. In 1976 and 1987, the Department of the Treasury and Department of Commerce determined that certain categories of tapered ball bearings from Japan were being sold in the United States at less than fair value. *Tapered Roller Bearings and Certain Components from Japan*, 41 Fed. Reg. 34,974 (1976); *Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan*, 52 Fed. Reg. 37,352 (1987).

Petitioners export to the United States the types of ball bearings that were determined to have been dumped. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 66,711, 66,712 (2000). The antidumping duties on petitioners' exports were made the subject of an administrative review proceeding of the antidumping duty for the period from October 1, 1998, to September 30, 1999. *Id.* at 66, 712.

In that administrative review, which is the subject of the present litigation, petitioners challenged the Department of Commerce's method of calculating the weighted average dumping margin. Petitioners argued that Commerce's failure to include sales with a "negative" dumping margin, *i.e.*, where the export price exceeded the normal value, to offset instances of dumping

resulted in an inflated weighted average and was thus contrary to the Uruguay Round Anti-Dumping Agreement and the URAA.[5] In support, petitioners cited a WTO report involving the European Communities and India, which found that the European Communities' treatment of nondumped sales was inconsistent with the Anti-Dumping Agreement. Pet. App. 121a-122a (noting petitioners' reliance on *European Communities —Antidumping Duties on Imports of Cotton-Type Bed Linen from India* (*EC-Bed Linen*), WT/DS141/AB/R (Mar. 1, 2001), *reprinted in part at* Pet. App. 105a-118a .

In an Issues and Decision Memorandum, which the Department of Commerce adopted in its final determination, the Department responded that its treatment of petitioners' non-dumped sales followed from a long-standing interpretation of domestic law, which governed the proceeding, and noted that the methodology had been sustained repeatedly as reasonable by the Court of International Trade. Pet. App. 125a; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews*, 66 Fed. Reg. 15,078 (2001) (adopting Issues and Decision Memorandum). The Department of Commerce also noted that the *EC-Bed Linen* report had addressed only the European Communities' antidumping duty, and "was not a challenge to U.S. law." Pet. App. 125a.

---

[5] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Apr. 15, 1994) *reprinted in* H.R. Doc. No. 316, *supra*, at 807 (Anti-Dumping Agreement), was implemented as part of the Uruguay Round Agreements that created the WTO. See 19 U.S.C. 3511(a) and (d)(7).

4. Petitioners challenged the Department of Commerce's final determination in the Court of International Trade, which ruled in favor of the government.

The Court of International Trade first held that petitioners' reliance on the WTO's construction of the Uruguay Round Agreement was not foreclosed by 19 U.S.C. 3512(c)(1)(B), which provides that no person may "challenge, * * * under any provision of law, any action * * * by any department * * * on the ground that such action or inaction is inconsistent with such agreement." The court reasoned that this language barred only an "action under" a WTO agreement, not one based on Congress's presumed intent to act consistenty with the United States' international obligations. Pet. App. 33a.

Addressing the merits, the Court of International Trade noted that it had previously affirmed the Department of Commerce's treatment of non-dumped sales as a reasonable interpretation of 19 U.S.C. 1673. Pet. App. 41a (citing *Serampore Indus. Pvt. Ltd.* v. *United States Dep't of Commerce*, 675 F. Supp. 1354, 1360-1361 (Ct. Int'l Trade 1987), and *Bowe Passat Reinigungs-Und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996)). The court stated that it "would only continue to uphold the Department's practice of zeroing 'until it becomes clear that such a practice is impermissible.'" Pet. App. 41a (quoting *Bowe Passat*, 926 F. Supp. at 1150). The court found, however, that the *EC-Bed Linen* report had not clearly established that the Department of Commerce's methodology was "impermissible." *Id.* at 41a-43a. Specifically, the court noted that it could not determine whether the European Communities' method for calculating the duty at issue in *EC-Bed Linen* and the United States' practice at issue here were the same,

and that only the ministerial body of the WTO—not courts in the United States—could interpret an Appellate Body report. *Id.* at 41a-42a.

The court also noted possible bases for distinguishing the *EC-Bed Linen* report. Whereas the *EC-Bed Linen* report involved an initial antidumping investigation, covered by Article 2.4.2 of the Anti-Dumping Agreement, this case involves an annual review of sales already subject to an antidumping order, which are governed by distinct provisions in both the Anti-Dumping Agreement and the URAA. Pet. App. 42a-43a.

5. The Federal Circuit affirmed. Pet. App. 1a-18a. Like the Court of International Trade, the court of appeals first held that Section 3512(c) did not bar an "action under U.S. law" urging that a domestic statute should "be interpreted so as to avoid a conflict with international obligations." *Id.* at 7a-8a. On the merits, the court recognized that it was "a close question" whether the common definition of the word "exceeds" compelled the conclusion, adopted by the Department of Commerce, that only those sales in which the normal value was "greater than" the export price should be counted in computing the weighted average dumping margin. *Id.* at 9a. While the court declined to find that the statute unambiguously required the Department's construction, it held that the language "at a minimum allow[s]" for that interpretation. *Id.* at 10a. The court also found that the Department's view was supported by the statutory provision for calculating dumping duties "on an entry-by-entry basis," and by the previous endorsement of the Court of International Trade. *Id.* at 10a-11a.

The court of appeals specifically considered petitioners' argument that the Department's interpretation was no longer permissible in light of an amendment to 19 U.S.C. 1677b, adopted in 1994 as part of the URAA, which provided that, in determining whether dumping is occurring, a "fair comparison" should be made between the United States price and the normal value. The court noted that the statute "specifically defined" the requirements for making a "fair comparison," Pet. App. 13a, and that these requirements did not "unambiguously address the practice of zeroing," *id.* at 11a.

Finally, the court noted the inapplicability of the WTO panel report in *EC-Bed Linen*, which neither involved the United States' specific practice nor dealt with an "administrative review" of a prior "antidumping investigation." Pet. App. 14a. Thus, the court concluded, the *EC-Bed Linen* report was not "sufficiently persuasive to find the Department's practice unreasonable." *Ibid.*

**ARGUMENT**

The court of appeals correctly held that the Department of Commerce's calculation of aggregate dumping margins in this administrative review proceeding was reasonable. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 2-4, 14-24) that the Court should grant certiorari to determine whether an agency's otherwise reasonable interpretation of a statute, which would normally be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), must be overturned in light of *Murray* v. *The Schooner Charming*

*Betsy*, 6 U.S. (2 Cranch) 64 (1804), on the ground that the challenged agency practice is allegedly inconsistent with an international body's interpretation of an executive agreement to which the United States is a party. Petitioners rely (Pet. 2) on this Court's observation in *Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," 6 U.S. (2 Cranch) at 118. According to petitioners, the *Charming Betsy* canon establishes broad judicial authority to conform domestic law and acts of the Executive Branch to principles of customary international law. For example, petitioners urge that "the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable [Executive Branch] interpretations those that violate an international obligation of the United States." Pet. 17.

We note at the outset that neither *Charming Betsy* nor other decisions of this Court applying it stand for such a broad principle. *Charming Betsy* itself dealt with the question whether a domestic statute prohibiting trade by Americans with France should be construed to apply to an American ship that had been purchased by a citizen of Denmark, a country that was neutral with respect to the hostilities between the United States and France. 6 U.S. (2 Cranch) at 115-116. Thus, as is clarified by the continuation of the sentence quoted by petitioners, the question specifically addressed by the Court was whether the statute adopted by Congress should "be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Id.* at 118.

This Court's subsequent cases applying *Charming Betsy* have likewise involved avoidance of "unrea-

sonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (application of antitrust statute to conduct with adverse foreign effect). See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (application of employment discrimination statute to bases in foreign lands that were the subject of executive agreements with the host governments); *McCulloch* v. *Sociedad de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (application of Jones Act in maritime cases); see generally *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 814-815, 817 (1993) (Scalia, J., dissenting) (describing principle as one of "prescriptive comity," that "Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe").

This case does not present a proper vehicle for considering whether the *Charming Betsy* canon should be extended in the manner advocated by petitioners. The court of appeals correctly concluded that the WTO reports upon which petitioners rely addressed a different type of administrative proceeding that is governed by a different provision of the Anti-Dumping Agreement. Thus, even if the *Charming Betsy* rule were as broad as petitioners contend and did apply to WTO reports, the WTO rulings on which petitioners rely would not be an adequate basis for overturning the Department of Commerce's long-standing and reasonable construction of the domestic antidumping statute. Moreover, the *Charming Betsy* canon, whatever its proper scope, has no application where, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the Uruguay

Round Agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts. Further review is therefore not warranted.

a. As the court of appeals correctly held, the Department of Commerce's determination at issue here is not inconsistent with the Uruguay Round Agreements or any WTO report concerning them. The court of appeals specifically noted petitioners' argument that, under *Charming Betsy*, the Department of Commerce's administrative review methodology should be overturned as inconsistent with the United States' obligations under the Anti-Dumping Agreement as construed by the WTO Appellate Body in *EC-Bed Linen*. Pet. App. 12a-13a. The court also noted the government's argument that, under the URAA, WTO reports could not be relied upon by the courts in the way petitioners urged. *Id.* at 7a. The court of appeals found it unnecessary to address the government's argument, however, because the WTO report upon which petitioners relied was not sufficiently on point to provide a basis for overruling the Department of Commerce's long-standing construction, even under petitioners' theory. *Id.* at 15a. Accordingly, this case does not actually present the question raised in the petition.

i. The court of appeals observed that the *EC-Bed Linen* case addressed only a specific determination of the European Commission. Pet. App. 14a. In particular, that case involved an initial dumping investigation, rather than an administrative review of a previous dumping determination, which are distinct proceedings and are governed by different provisions in the Anti-Dumping Agreement. *Ibid.* As the Court of International Trade explained, that difference is significant because, under the terms of both the Anti-Dumping

Agreement and United States law, the former involves "a comparison * * * of weighted averages for export prices and normal value," while the latter "involves a comparison * * * of weighted-average normal values to transaction-specific export prices." Pet. App. 42a. See *id.* at 127a-128a (Anti-Dumping Agreement, Art. 2.4.2, providing for average-to-average comparisons in "the investigation phase"); 19 U.S.C. 1677f-1(d)(1)(A) (same); 19 U.S.C. 1677f-1(d)(2) (providing, in administrative reviews, for comparison of "export prices * * * of individual transactions to the weighted average" of normal values).

Indeed, the WTO reports upon which petitioners rely have noted this same distinction, and the possibility that the practice of "zeroing" may be permissible in the context of an administrative review involving an export-transaction-to-average-normal-value comparison. See *United States—Final Dumping Determination on Softwood Lumber from Canada* (*US-Softwood Lumber*), WT/DS264/R (Apr. 13, 2004), *reprinted in part at* Pet. App. 63a, 79a n.361; *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (*US-Corrosion-Resistant Carbon*), WT/DS244/AB/R (Dec. 15, 2003), *reprinted in part at* Pet. App. 98a, 103a-104a (paras. 136-138).[6]

---

[6] Petitioners emphasize the WTO Appellate Body's reliance in the *EC-Bed Linen* report on the "fair comparison" language in Article 2.4 of the Anti-Dumping Agreement, and the fact that the URAA inserted the term "fair comparison" in 19 U.S.C. 1677b(a). Pet. 5-6, 9. As the court of appeals noted, however, the URAA exhaustively lists the requirements necessary to make the comparison "fair," a list that does not preclude "zeroing." Pet. App. 12a-13a. Moreover, in the *US-Softwood Lumber* report, the WTO panel did *not* rely upon the "fair comparison" language, but instead

Thus, the WTO has not yet addressed the practice of "zeroing" in administrative reviews. As the *US-Corrosion-Resistant Carbon* report reflects, the USTR is actively defending the administrative review methodology as consistent with the Anti-Dumping Agreement and takes the position that the *EC-Bed Linen* report "is not relevant" to that question. Pet. App. 103a (para. 136). The court of appeals agreed, and petitioners' fact-bound disagreement with that determination does not merit review.

ii. The court of appeals observed that while these WTO reports addressed, at best, only a somewhat analogous question, the Department of Commerce's position was supported by both the language of the statute and the agency's long-standing practice, which had been upheld repeatedly. Pet. App. 11a.

As noted, pp. 3-4, *supra*, the antidumping statute defines the term "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate * * * [United States] prices of such exporter or producer," 19 U.S.C. 1677(35)(B), and defines the term "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," 19 U.S.C. 1677(35)(A). Thus, the statute directs the Department of Commerce to calculate the sum of the amounts "by which the normal value *exceeds* the export price." 19 U.S.C. 1677(35)(A) (emphasis

---

cited a different provision of Article 2.4.2, the requirement that an investigation comparison include "all comparable export transactions." See *US–Softwood Lumber, reprinted in part at* Pet. App. 77a-78a (para. 7.216), 81a (paras. 7.224-7.226). Notably, the URAA did not adopt the "all comparable export transactions" language into the governing statutory scheme.

added). The court of appeals recognized that it was a "close question" whether the Department of Commerce's approach, under which only positive dumping margins are counted, was compelled by the accepted definition of the word "exceed" as "greater than." Pet. App. 9a. At the very least, the court concluded, this reading is an eminently reasonable one. *Id.* at 10a.

Indeed, the zeroing practice, which has been followed for at least 20 years, has been repeatedly sustained as reasonable by the Court of International Trade, which has noted the practice's success in combating the problem of "masked dumping."[7] Pet. App. 11a (citing *Serampore*, 675 F. Supp. at 1360-1361, and *Bowe Passat*, 926 F. Supp. at 1150). As the Court of International Trade has noted, "[t]he practice of considering negative margins as zero ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." *Serampore*, 675 F. Supp. at 1360. This "longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.'" *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978) (quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921)).

The Federal Circuit's fact-specific holding that off-point WTO reports did not render impermissible the Department of Commerce's long-held, reasonable inter-

---

[7] Masked dumping occurs when "certain profitable sales serve to 'mask' sales at less than fair value." Pet. App. 11a. If non-dumped sales are included in the calculation of dumping margins, then foreign producers and importers will be better able to target particular markets within the United States in which to lower prices below normal value when necessary to capture sales.

pretation of the antidumping statute is correct and does not warrant review by this Court.

b. Even if the WTO reports were more directly on point, this case would be an inappropriate vehicle for considering the broad question of the relationship between *Chevron* and *Charming Betsy*. In the URAA, Congress has established an elaborate process by which the political branches, not the courts, are to determine whether and how the United States will alter its practices in light of reports from WTO bodies. Where Congress has spoken to the means of resolving purported conflict between domestic law and the United States' international commitments, the *Charming Betsy* presumption, whatever its proper scope, has no application.

As petitioners concede (Pet. i), *Charming Betsy* states a canon of statutory construction; it does not purport to establish an absolute rule that the "law of nations" trumps inconsistent domestic laws or governmental acts. See *McCulloch*, 372 U.S. at 21-22. In the face of a "clear expression" of congressional intent, the *Charming Betsy* canon is inapplicable. *Id.* at 22.

In enacting the URAA and adopting the SAA, Congress has unequivocally stated that United States domestic law shall take precedence over international law as established in the Uruguay Round executive agreements. The URAA specifically prohibits enforcement through judicial proceedings of purported international obligations under the Uruguay Round Agreements. In particular, in Section 3512, Congress specified the primacy of domestic law over any inconsistent provision of the Uruguay Round Agreements, 19 U.S.C. 3512(a)(1); clarified that, "unless specifically provided," nothing in the URAA "shall be construed * * * to limit any authority conferred under any law of the

United States," 19 U.S.C. 3512(a)(2); and specifically barred challenges, such as those raised in this case, to agency action on grounds of alleged incompatibility with the Uruguay Round Agreements, 19 U.S.C. 3512(c)(1) ("No person * * * may challenge, in any action brought under any provision of law, any action or inaction by any department * * * of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.").

Congress also expressly provided that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change," H.R. Doc. No. 316, *supra*, at 659. If a WTO panel concludes "that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" Congress, the USTR, and the agency have consulted about the appropriate response. 19 U.S.C. 3533(g)(1). Moreover, the statute contemplates that, as a result of that consultation, the United States may choose *not* to alter the law or practice that is the subject of an adverse Appellate Body report. H.R. Doc. No. 316, *supra*, at 1016; 19 U.S.C. 3533(f)(3), 3538(b)(4).[8]

---

[8] This is not to suggest that WTO panel and Appellate Body reports are entirely irrelevant under the URAA. In situations in which the United States has instituted an action against a state under Section 102(b)(2) of the URAA (19 U.S.C. 3512(b)(2)), a federal court may take judicial notice of a panel or Appellate Body report and consider the views of the panel or the Appellate Body to the extent that the court considers them to be persuasive. H.R. Doc. No. 316, *supra*, at 675. In addition, any agency of government may "consider[], or entertain[] argument on, whether its action or proposed action is consistent with the Uruguay Round agree-

Because Congress has clearly specified that the political branches, and not the courts, are to determine whether and how to conform the government's practices to the constructions of the executive agreement adopted by WTO bodies, there is no justification for resorting to *Charming Betsy* or any other default rule. Indeed, application of such a default rule in this case would thwart Congress's scheme rather than promote its presumed intentions.

2. Finally, contrary to petitioners' assertion, the decision of the Federal Circuit does not conflict with the decision of any other circuit regarding the question whether the *Charming Betsy* canon should be applied to invalidate an agency action that would otherwise be entitled to *Chevron* deference. Indeed, petitioners cite no case in which a court of appeals has struck down an otherwise reasonable agency interpretation of an ambiguous statute on *Charming Betsy* grounds.

Petitioners cite *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), as "employ[ing] the *Charming Betsy* rule to limit the range of interpretations that can be deemed reasonable, and therefore entitled to deference, under *Chevron*." Pet. 19. In fact, before it even reached the *Charming Betsy* question, the Ninth Circuit held that the agency was "not entitled to deference" because its "position is inconsistent with existing [agency] policy and regulations." 346 F.3d at 885. Plainly, then, *Ali* does not support petitioners' argument that an agency's long-standing and otherwise reasonable con-

---

ments, although any change in agency action would have to be authorized by domestic law." *Id.* at 676. But Congress made clear that "[a] private party * * * could not sue (or defend suit against) the United States, a state or a private party on grounds of consistency (or inconsistency) with [the WTO] agreements." *Ibid.*

struction of a statute can be invalidated on the basis of the *Charming Betsy* interpretive rule.

Petitioners also claim a conflict with the D.C. Circuit's decision in *George E. Warren Corp.* v. *U.S. Environmental Protection Agency*, 159 F.3d 616 (1998), amended on other grounds, 164 F.3d 676 (1999). But that case, which *upheld* an agency's discretion to take a WTO report into account in construing the relevant statute, presents no conflict with the Federal Circuit's ruling in this case. In *Warren*, the WTO issued an adverse opinion with respect to an Environmental Protection Agency (EPA) rule. 159 F.3d at 619. Pursuant to 19 U.S.C. 3533, the USTR "advised the WTO that the United States intended to comply" with the decision. 159 F.3d at 619. The EPA then promulgated a new rule, consistent with the USTR's decision. *Id.* at 619-620. The plaintiffs in *Warren* challenged the EPA's consideration of the WTO report in promulgating its new rule. The D.C. Circuit held that nothing in the text or structure of the statute indicated that "Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the * * * treaty obligations of the United States." *Id.* at 623. The D.C. Circuit's opinion, which *permits* an agency to consider a WTO report where the Executive Branch determines that compliance is appropriate, provides no authority for a rule, such as that urged by petitioners, that an agency is *required* to amend its practices to conform to a WTO report with which the Executive Branch disagrees.

The decision below is entirely consistent with *Warren*. The court of appeals has not suggested that the Department of Commerce would be precluded from adopting a non-zeroing construction of the statute, if the WTO bodies ultimately determine that zeroing is

inconsistent with the Anti-Dumping Agreement as it relates to administrative reviews.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General*

GREGORY G. KATSAS
*Acting Assistant Attorney General*

DAVID M. COHEN
JEANNE E. DAVIDSON
CLAUDIA BURKE
*Attorneys*

SEPTEMBER 2004